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In The Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DAVID THOMPSON, ALLEN AULT, A.G. THOMAS, MICHAEL GROVES, and HUGH LONG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does incarcerating Petitioner in solitary confinement for seventeen years for his protection against imminent death from other inmates in the general prison population constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments when he could have been transferred to another prison where he would have been safe in the general prison population?

2. Does qualified immunity protect prison officials against liability for continuing the incarceration of Petitioner in solitary confinement for seventeen years to protect him against death from other inmates in the general prison population when they have been deliberately indifferent to transferring him to another prison where he would have been safe in the general prison population?

3. Does incarcerating the Petitioner where he is subject to imminent threat death in the general prison population or perpetual solitary confinement which after long periods are calculated to disrupt profoundly his senses and personality violate the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*?

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The opinion of the United States Court of Appeals for the Eleventh Circuit,, March 9, 2004, in *Doe v. Thompson, et al.*, No. 03-11576, is set forth in the Appendix at A-1, holding that the Petitioner could not maintain a cause of action under the Eighth and Fourteenth Amendments because of his seventeen years in administrative solitary confinement. The order, March 13, 2003, of the United States District Court for the Southern District of Georgia, Civil Action No. CV 695-147, is set forth in the Appendix at A-3, not allowing Plaintiff to raise at trial the length of confinement in administrative segregation. The decision of the United States Court of Appeals for the Eleventh Circuit, June 7, 2000, is set forth in the Appendix at A-5, holding that Petitioner could establish Eighth Amendment violations if he proved that he was an informant housed in segregated confinement with violent and threatening felons, that the officials ignored his requests and placed him in solitary confinement for a substantial period of time satisfying the substantial risk of irreparable harm requirement for a preliminary injunction. The order, March 28, 2000, of the United State District Court for the Southern District of Georgia, is set forth in the Appendix at A-13, granting summary judgment and not considering the length of confinement. The Magistrate Judge's Report and Recommendation, March 6, 2000, is set forth in the Appendix at A-15.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on May 20, 2003. (Appendix, A-1). The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VIII. ..nor cruel and unusual punishments inflicted.

AMENDMENT XIV. SECTION I. ...nor shall any State deprive any person, of life, liberty, or property, without due process of law;

18 U.S C. § 2340. Definitions

As used in this chapter -

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from... (C) the threat of imminent death; or (D)... other procedures calculated to disrupt profoundly the senses or personality;"

STATEMENT OF THE CASE

Petitioner, John Doe, was in the federal witness protection program because he had testified in eight murder trials involving the Nuestro Familia, Mexican Mafia, and Aryan Brotherhood resulting in contracts on his life. He was charged in Georgia for aggravated child molestation arising out of a domestic dispute. The Assistant District Attorney for Gwinnett County, Georgia broke his cover and disclosed his real name to the press during his trial. While incarcerated the Georgia Department of Corrections continued to disclosure of his real name on their website Inmate Query. He was exposed to death threats and attack by former members of the Nuestro Familia while in Valdosta State Prison and was transferred to Autry State Prison and then to Georgia State Prison where he was continually in indefinite administration segregation in solitary confinement for seventeen years. He requested to be transferred to other prisons in state and out of state and even to a federal facility where his real name would not be disclosed and where his life would not be in danger among the general prison population.

On August 17, 1995 Doe filed a complaint under 42 U.S.C. §1983 seeking relief from his incredibly long solitary confinement which was extremely punitive, from retaliatory actions of prison wardens and officials, and from the harsh conditions of confinement. The District Court, Judge William T. Moore, following the Magistrate's Report and Recommendations dismissed the Complaint for deliberate indifference in keeping him indefinitely in solitary confinement rather than transferring him to a prison where he would be safe in violation of the Eight Amendment and dismissed his Motion for Preliminary Injunction. (Appendix, A-13, A-15)

Doe filed an appeal to the United States Court of Appeals for the Eleventh Circuit to review the denial of the Motion for Preliminary Injunction. On June 7, 2000 the

Court of Appeals reversed and remanded the denial of a preliminary injunction and instructed on the dismissal of Doe's Eighth Amendment and First Amendment claims. (Appendix, A-5). The Court of Appeals instructed that Doe could establish Eighth Amendment violations if he proved that he was an informant housed in segregated confinement with violent and threatening felons and that the officials ignored his requests placing him in solitary confinement for a substantial period of time would satisfy the substantial risk of irreparable harm requirement for a preliminary injunction. The Court of Appeals also held that Doe's first Amendment claim was sufficient to support a preliminary injunction. And finding that the Petitioner met the four criteria for a preliminary injunction the Court of Appeals vacated and remanded to the District Court for an evidentiary hearing.

Armed with the Court of Appeals decision, Doe again made a Motion for a Preliminary Injunction and again the Magistrate Judge recommended denial and the District Court denied the preliminary injunction on the grounds that there had been no showing of irreparable harm because of the prison conditions, but the District Court refused to consider the fundamental Eighth Amendment issue of the length of solitary confinement. The Court of Appeals affirmed the District Court denial of a preliminary injunction on October 21, 2002. The District Court also denied a motion to have an expert appointed as well as a physical and mental examination to establish the evidence of the irreparable harm of the extreme long-term solitary confinement. His extraordinary length of solitary confinement may be the longest in modern prison history and to which the Respondents were intransigently deliberately indifferent.

In an order of March 4, 2003, the District Court reaffirmed that the length of his solitary confinement would not be addressed as an issue at his upcoming jury trial. A Motion to Modify the Court's Order was made on March 7, 2003 to consider the length of his solitary confinement as an

Eighth Amendment violation which was also was denied on March 14, 2003. (Appendix, A-3).

An appeal was taken to the United States Court of Appeals for the Eleventh Circuit appealing from the final disposition of the case on March 19, 2003 and filed as the Order of the Court on March 20, 2003 and the Plaintiff appealed the dismissal of his Eighth Amendment and Fourteenth Amendment causes of action for relief from the exceptional long incarceration in administrative solitary confinement.

At the oral argument the panel of the United States Court of Appeals for the Eleventh Circuit ordered mediation which after seventeen years finally resulted in the Georgia Department of Corrections agreeing to Petitioner's transfer from solitary confinement at the Georgia State Prison to another person where he could be safe in the general population. However, the issues remained open as to: (1) whether the District Court should have allowed the Petitioner to pursue an action under the Eighth and Fourteenth Amendments because of the deliberate indifference to his seventeen years in administrative solitary confinement, and (2) whether the Court erred in granting judgment as a matter of law in favor of the Respondents? The United States Court of Appeals for the Eleventh Circuit opinion, March 9, 2004, ruled that because the Petitioner had been in protective custody at his own request and had suffered no legally cognizable injury as a result, the District Court was affirmed on both issues. (Appendix, A-1).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CONFLICT IN THE CIRCUITS AS TO WHETHER EXTENDED ADMINSTRATIVE SOLITARY CONFINEMENT VIOLATES THE EIGHTH AMENDMENT AND THE FOURTEENTH AMENDMENT

This case presents the fundamental issue as to whether de facto keeping an inmate incarcerated in solitary confinement for an extended indefinite period of time is cruel and unusual punishment and therefore violative of the Eighth Amendment as well as the Fourteenth Amendment. The Eleventh Circuit in this case has said that even seventeen years in administrative solitary confinement does not violate the Eighth Amendment citing that the Petitioner had "suffered no legally cognizable injury as a result." (Appendix, A-2). Other Circuits have reached different results and even the Eleventh Circuit has formerly reached a different conclusion. The length of solitary confinement is a controlling factor looked to in evaluating Eighth Amendment protections of inmates against cruel and unusual punishment. *Colon v. Howard,* 215 F. 2d 227 (2nd Cir. 2000) found that 305 days of non- punitive segregated confinement was "atypical" and a "severe hardship" and set a bright line for any administrative segregated solitary confinement greater than 180 days. The Second Circuit again ruled in *Tellier v. Fields*, 280 F. 3d 69, 80 (2d Cir. 2000) that 504 days in solitary confinement was passed the limit. Even the Eleventh Circuit previously in *Sheley v. Drugger*, 833 F. 2d 1420, 1429 (11th Cir. 1987) had ruled that the length of time in solitary confinement can rise to an Eighth Amendment violation, holding that, "Sheley's twelve year confinement in CM raises serious constitutional questions." *Williams v. Fountain*, 77 F. 3d 372 (11th Cir. 1996) had previously set a high water mark in the Eleventh Circuit of twelve months in solitary confinement.

II. THE DECISION OF THE COURT OF APPEALS IN SANCTIONING THE PETITIONER'S INDEFINITE SOLITARY CONFINEMENT FOR SEVENTEEN YEARS AS PROTECTION FROM IMMINENT THREAT OF DEATH FROM OTHER INMATES CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT DEFINING CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS

The Respondents have simply put Doe to an intolerable Hobson's choice, "your life or perpetual solitary confinement." The Respondents have admitted in their briefing to the Court of Appeals that they could have transferred Doe to another jurisdiction where he would be relatively safe incarcerated in the general prison population, but the Respondents chose not to do so because the State of Georgia would have to pay for his incarceration in another jurisdiction. They also chose not to transfer him to another prison in Georgia where he could be relatively safe in the general prison population, but with deliberate indifference and even intention defiance they chose not to transfer him and to keep him in perpetual solitary confinement.

The District Court did not consider his Eight Amendment cause of action arising out of his seventeen years of administrative solitary confinement. Petitioner who is indigent had made motions to have an expert appointed and medical and psychological examination of him in order to show the extreme psychological risks and effects that long duration solitary confinement has on inmates generally and specifically on the Petitioner in his intolerable situation. The Court denied the Plaintiff's motions and then ruled that the Plaintiff had not shown irreparable injury even in the face of the then fifteen years of solitary confinement.

The Court of Appeals in the June 7, 2000 opinion found on the unusual facts in the instant case that *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) was controlling

precedent that "a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment if the official knows that the inmate faces a substantial risk of harm and disregards that risk by failing to take reasonable efforts to abate it." (Appendix A-10) And the Court's decision held that under the facts of Doe's pleadings and affidavits that "Doe established an Eighth Amendment violation under *Farmer*." *Id.*at A-10. This Court also held that Doe had a viable first Amendment claim because of his filing grievances and lawsuits against prison officials and because he had filed "too many writs", that he suffered many retaliatory abuses including placing him in administrative segregation. The Court of Appeals further found that the "unusual facts establishing that Doe was a government informant and had received threats to his life, he had satisfied the second prong of the test for a preliminary injunction that there was a substantial risk of irreparable harm." *Id.* at A-11. The Court of Appeals found violative of the Eighth Amendment was that Doe as an exposed federal protected informant "had informed prison officials on numerous times of threats on his life and of his need for protective custody, that they ignored his requests, and placed him into solitary confinement as punishment." *Id.* at A-10.

Nevertheless, following remand, the Magistrate on March 6, 2000 recommended that Petitioner's Motion for Preliminary Injunction be denied considering only his solitary confinement conditions and not the length of his confinement, which on March 28, 2000 the District Court adopted which was affirmed on appeal. (Appendix, A-13, A-15). The Court in advance of trial on March 4, 2002 again ordered that the Petitioner's conditions of confinement would not be able to addressed at trial. Petitioner then requested a modification of the Court's Order of March 4, 2003 to hear the Petitioner's continued Eighth Amendment cause of action as to the length of his solitary confinement. The Court denied his motion to hear the Eighth Amendment claim arising out of the length of confinement, thereby

foreclosing him from any meaningful relief from perhaps the longest solitary confinement in recent prison history. Petitioner proceeding pro se filed a Motion for Modification to be allowed to proceed with his claim for relief from indefinite solitary confinement correctly cited the controlling precedent Supreme Court case of *Sandin v. Conner*, 515 U.S. 472 (1995) and the Eleventh Circuit case of *Sheley v. Dugger*, 833 F. 2d 1420 (1987).

In *Sandin v. Conner*, supra, the Supreme Court announced that Due Process of the United States Constitution protects against "imposing atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. 472, 474. In *Sheley v. Dugger*, supra, the Eleventh Circuit reaffirmed that twelve years of administrative solitary confinement would violate the Eight Amendment recognizing the physical and mental deterioration of inmates facing prolonged confinement in maximum security and that the existence of feasible alternatives should have been implemented including transferring the inmate to a less dangerous prison where his identity could have been kept secret or releasing him on parole. The Eleventh Circuit in *Sheley* found support in the repeated decisions Supreme Court including *Hewitt v. Helms*, 459 U.S. 460, 477 (1983) "Of course, administrative segregation may not be used as a pretest for indefinite confinement of an inmate" and *Hutto v. Finney*, 437 U.S. 678, 686 (1978) "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Sheley* also cited the First Circuit's analysis in *Jackson v. Meachum*, 699 F. 2d 578, 584-85 (1st Cir. 1983) that "the threat of substantial serious and possibly irreversible, if not critical, psychological illness together with prolonged or indefinite segregated confinement would increase the burdens on prison authorities to explore feasible alternative custodial arrangements." The opinion then latched on to the constitutionally troubling twelve years in

administrative confinement which "raises serious constitutional questions." 833 F. 2d 1420, 1429.

The graveman of Doe's complaint is the length of his indefinite solitary confinement. The District Court ruled adversely to the Plaintiff that the conditions of confinement (food, sanitary, etc) were adequate but did not rule on the length of solitary confinement as an Eight Amendment violation. Certainly the conditions of solitary confinement which the Plaintiff has had to undergo have been horrendous: solitary confinement twenty-three hours a day in 1930's cramped cells, only allowed solitary exercise one hour a day in a six foot by eight foot exercise pen (Tr. 85), constant second hand smoke (Tr. 68), constant noise (Tr. 68), always cold food (Tr. 81-81), only three showers a week (Tr.80), and no law library (Tr. 68, 80), educational (Tr. 83), or religious privileges (Tr. 83.). But these horrendous conditions of solitary confinement are not the real issue in this case. The overriding issue is that indefinite solitary confinement crosses the line and violates the Eighth Amendment because of its substantial length in light of the well known and judicially documented substantial risk of severe mental and emotional harm. Under the *Sandin* test of "atypical and significant hardship", it also violates Due Process under the Fourteenth Amendment.

The Court of Appeals and District Court case law is replete with examples of inmates who have been held in solitary segregation for extended periods and found to be violative of the Eighth Amendment. Eighth Amendment claims of prisoners confined to segregation have recognized that the length of time in isolation is a controlling factor to be considered. *Bono v. Saxbe*, 620 F. 2d 609, 614 (7th Cir. 1980); *Swell v. South Carolina, Department of Corrections*, 529 F. 2d 854, 861 (4th Cir. 1975); *O'Brien v. Monarty*, 489 F. 2d 941, 944 (1st Cir. 1974). The case of *McClary v. Kelley*, 4 F. Supp. 2d. 195 (W.D.N.Y. 1998), affirmed 237 F. 3d 185 (2nd Cir. 2001) is particularly instructive with reviews

the psychological evidence as well as summarizing the state of the law of the constitutional limits of administrative solitary confinement. *McCary* is similar to the instant case in that the inmate was kept in administrative segregation in a special housing unit in solitary confinement in his cell for 23 hours a day and solitary access to a very confined exercise call which shocked the conscience of the court that the solitary confinement continued for four years. The trial court in *McCary* cited psychological expert testimony that such solitary confinement endured in excess of four years "was beyond anything a human being can tolerate...A restriction of environmental and social stimulating that is so prolonged is a toxin that you keep feeding into that individual and he's going to get sick" and that the inmate "would suffer severe psychiatric harm" because of the "severe departure form general prison conditions." *McClary* at 207. The Court in *McCary* found that "for the purposes of *Sandin*, this Court need not and will not decide whether a specific independent psychiatric 'syndrome' exists with respect to the psychopathological effects of prolonged SHU confinement" only that "prolonged isolation from social and environmental stimulation increases the risk of developing mental illness." *McClary*, at 208. In comparison the Plaintiff's solitary confinement in this instant case continued for seventeen years for twenty-four hours a day in a five by eight foot cell and one hour a day in a six by eight foot exercise pen.

Even the head of mental health for the Georgia Department of Corrections, Dr. Jim DeGroot, was quoted recommending inmates not be held in isolation for more than 60 days cautioning, "Long-term solitary confinement can cause some inmates to become severely depressed, become suicidal or develop other serious mental illnesses." Quoted in article by Joshua B. Good, *Atlanta Journal and Constitution*, June 21, 2000, p. B8 (Attached as "Exhibit C" to Motion for Injunctive Relief). The Affidavit of Dr. Gary Ganahl, who has been a consulting psychologist for the Georgia Department for Corrections for over thirteen years

demonstrates that the "risks of medical, psychiatric, and social damages produced by forms of solitary confinement are known to be serious" and "may not be reversible once they occur." (Attached as "Exhibit B" to Motion for Injunctive Relief). Dr. Ganahl noted that:

> "The risks of medical, psychiatric, and social damages produced by forms of solitary confinement are known to be serious and relevant to both psychiatric and non-psychiatric, healthy and ill patients. These risks have been documented to increase with the length of such confinement and have been shown by research to produce serious psychiatric and medical disorders. Such disorders may not remit simply by the termination of isolation, and have not been shown definitively to be reversible once they have been caused by these special forms of incarceration.... I know of no cases in the Georgia Department of Corrections where prisoners have been allowed to stay in protected isolated custody for anything approaching this length of time. Nor would it be in their best interests of the prisoner to be permitted to stay in protected custody for so long a period, even if the prisoner requested it."

Many courts have found similar debilitating effects of prolonged solitary confinement. "Social science and clinical literature have consistently reported that when human beings are subjected to social isolation and reduced environmental stimulation, they may deteriorate mentally and in some cases develop psychiatric disturbances." *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995). There is "plenty of medical and psychological literature concerning the ill effects" of segregation of prison inmates. *Davenport v. DeRoberts*, 844 F. 2d 1310,1316 (7th Cir. 1988). "In addition to causing physical deterioration, the conditions of solitary confinement occasioned severely negative and pernicious psychological effect on some inmates." *Ruiz v. Estelle*, 503

F. Supp. 1265, 1360 (S.D. Tex. 1980). Relying on the testimony of a psychologist who found that administrative segregation "and the sensory deprivation resulting from such confinement can have extremely harmful psychological effect upon the person involved." *Kelly v. Brewer*, 378 F. Supp 447, 451 (S.D. Iowa 1974). Relying on the testimony of a psychiatrist the Court found that "solitary confinement beyond a two or three week period would have a definite adverse effect upon most people." *Landman v. Royster*, 354 F. Supp. 1302, 1307 (E.D. Va. 1973). The fact is judicially noticed that prolonged confinement in administrative segregation "may constitute cruel and unusual punishment in violation of the Eighth Amendment." *Meriwether v. Faulkner*, 821 F. 2d 408, 415 (7th Cir. 1986); *Walker v. Shansky*, 28 F. 3d 666 (7th Cir. 1994).

The remedy that the Petitioner continually asked for, to be transferred to another Georgia prison or to a federal prison under the federal witness protection program where he could mingle with the general population, has been granted in previous cases. *Streeter and Linsey v. Hopper*, 618 F. 2d 1178 (5th Cir. 1980) affirmed the District Court's ordering the transfer of prison inmates' whose lives were in danger and who were exposed to conditions considerably more dangerous than those normal in prison life.

The deliberate indifference is clearly demonstrated by reference to the Georgia Department of Corrections own Rules which in Rule 125-2-4.18 Transfers. Paragraph (3) "The Commissioner may transfer any inmate to the Attorney General or the United States, or to any State which is a member of the corrections Compact, it it is determined that the available custody, care, treatment, training, or rehabilitation of such inmate is not adequate or in the best interest of the inmate or his (her) fellow inmates." O.C.G.A. § 42-5-51(d) provides similar authorization to transfer inmates or if necessary into federal custody. This is exactly

what the Petitioner Doe had been requesting all these years but falling on the indifferent deaf ears of the Respondents.

The trial Judge even though he dismissed the Plaintiff's cause of action for an injunction to be freed from administrative solitary isolation gratuitously commented without any legal force:

> "Mr. (Doe), I want you to know that the court, even though it has made the ruling that it considers the law mandates, it is not unsympathetic to your conditions. You're in the unfortunate situation of being someone who, because of your cooperation against other, has been placed in a confining situation that you do not desire... But I will say on the record that unless somebody just sticks their head in the sand in this case that there's got to be a better way to deal with you than the dilemma that exists at this time...You're paying the price for your crimes by being incarcerated, but it does appear that you're paying an additional price for your cooperation. I have not heard any evidence in this case that suggests that you should be in some sort of special protective custody, or that you should be in some sort of administrative segregation because you are a violent defendant, or prisoner: or because you're a threat to other prisoners. All the evidence before the court suggests that your reason for being in this status is because of your prior cooperation. And again I emphasize that somebody in the prison system should address this and find a better way of dealing with you than forcing you in a protective custody situation when there may be a better answer." (Tr. 91 - 92).

Although sympathetic the United States District Court for the Southern District of Georgia did not do

anything about the Petitioner's plight remaining in perpetual solitary confinement even after the Court of Appeals had held that he has a constitutional entitlement to relief which has been ignored by the trial court. It does no good to make the gratuitous findings quoted above unless the court is willing to back it up with an order. And it has done no good to bring the Petitioner's plight to the attention of the officials of the Georgia Department of Corrections because that had been done for seventeen years by the Petitioner protesting his continued indefinite solitary confinement and requesting that he be transferred to a prison where he could be safe in the general population.

This exhibiting of deliberate indifference is perhaps the most egregious solitary confinement violation of the Eighth Amendment in modern history. It is not his fault. It is clearly the fault the of the Respondents' disclosure of his real name and the continued intransient indifference of the Respondents as officials of the Georgia Department of Corrections to repeated requests to transfer him to a prison where his identity could be kept secret and his safety reasonably assured in the general prison population. The Georgia Assistant Attorney General arguing against giving John Doe relief from solitary confinement contend that he is in solitary confinement because of his own choices in testifying for the United States against the Mexican Mafia, entering the Federal Witness Protection Program, and then violating the child molestation laws of the State of Georgia. This argument ignores that the reason he initially requested administrative segregation seventeen years ago was that his real name had been disclosed by the Defendants and the Defendants had transferred him to a prison housing the most violent prisoners, including members of the Nuestra Familia who threatened and made attempts on his life. The Respondents' arguments also ignored John Doe's numerous requests for transfer to a safer prison environment where his real name would not be known and he could be safe in the general population.

III. QUALIFIED IMMUNITY DOES NOT PROTECT PRISON OFFICIALS FROM THE OBVIOUS CONSTITUTIONAL VIOLATIONS WHO UNDER COLOR OF LAW OF HAVE DE FACTO KEPT THE PETITIONER INCARCERATED IN SOLITARY CONFINEMENT FOR SEVENTEEN YEARS WITHOUT TRANSFERING HIM TO A PRISON WHERE HIS LIFE WOULD NOT HAVE BEEN IN IMMINENT DANGER

Qualified immunity does not protect prison officials against liability for continuing the incarceration of an inmate in solitary confinement for seventeen years to protect him against death from other inmates in the general prison population when they have been deliberately indifferent to transferring the inmate to another prison where he would have been safe in the general prison population. The recent United States Supreme Court case of *Hope v. Pelzer,* 536 U.S. 730 (2002) establishes that the Respondents can be liable for damages under 42 U.S.C. § 1983 when under color of law they "violate clearly established statutory or constitutional rights of which a reasonable person would have known", and that "for a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,...but it is to say that in light of pre-existing law the unlawfulness must be apparent."

Deliberate indifference to Plaintiff's plight of being held in administrative solitary confinement for the incredible period of seventeen years is abundantly clear that the Georgia official were violating the Petitioner's constitutional rights in violation of the Eight and Fourteenth Amendments. The opinion in *Hope v. Pelzer* pointed out that the standard

only required that prior law give officials a general "fair warning" that his conduct deprived his victim of a constitutional right, and that the standard for determining the adequacy of that warning was the same as the standard for determining whether a constitutional right was "clearly established" in civil litigation under § 1983." 536 U.S. 730, 740. Not only did the Defendants in Doe's case have fair warning that the continued deliberate indifference of continuing solitary confinement was very injurious to the Petitioner as well as grossly in violation of the United States Constitution, but they were directly advised by the Court of Appeals' previous opinion that continued long term administrative solitary confinement would violate the United States Constitution. The Respondents continued to incarceration him in solitary confinement and refused to transfer him to a prison where he would not be known and would be safe. The trial Court's gratuitous comments were of no force or effect and as for the last seventeen year fell on deal ears of officials of the Georgia Department of Corrections who would do nothing to relieve Doe's plight.

The Court of Appeals Decision found that the Petitioner "has suffered no legally cognizable injury as a result." (Appendix, A-2). This is a finding without any basis since there has been no hearing or evidence on the effects of the Petitioner's exceptionally long term incarceration in solitary confinement. If the Opinion was referring to the provisions in the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, its provisions cannot be applied retroactively to deny the Plaintiff any relief when there was no showing of actual physical injury to the Plaintiff. The United States Supreme Court in *Martin v. Hadix*, 527 U.S. 343 (1999), unequivocally held that the PLRA did not apply retroactively to cases which arose before the effective date of the PLRA. Justice O'Connor writing for the majority concluded, "Because we find the PLRA, if applied to post judgment monitoring services performed before the effective date of the Act, would have a retroactive effect inconsistent

with our assumption that statutes are prospective, in absence of an express command by Congress to apply the Act retroactively, we decline to do so." Following this precedent the Ninth Circuit in *Chappell v. Dickerson,* 238, F. 3d 427, 2000 U.S. App. Lexis 24816 (9th Cir. 2000) summarily permitted the same issue as in the instant case to go forward in an action involving psychological injury alone arising out of "deliberate indifference" actions of correctional officials prior to the effective date of the PLRA. The Eleventh Circuit in *Mitchel v. Farcass*, 112 F. 3d 1483 (11th Cir. 1997), distinguished the permitted current application of the PLRA to the procedural requirement of paying filing fee verses the prohibited substantive effect of impairing rights a party possessed before the enactment. *Thomas v. Hill,* 963 F. Supp. 753 (N.D. Ind. 1997) is a very similar case to the instant case in which the District Court held that the PLRA did not apply retroactively to an already filed case where the prison officials exposed the inmate to harm in retaliation for his testifying against another prison official who was dealing in illegal drugs and the inmate was not barred from pursuing an action for mental and emotional injury without prior showing of physical injury. Neither should the Petitioner be barred from establishing his legally cognizable injury as a result of his seventeen years in solitary confinement because of the deliberate indifference of the Respondents who knew or certainly should have known that their actions violated the constitutional and civil rights of the Petitioner in de facto incarcerating Petitioner in perpetual solitary confinement at the Georgia State Prison where his life would have been in imminent danger in the general prison population and not transferring him to a prison where he could have been in the general prison population with relative safety.

IV. THE INDEFINITE LONG TERM SOLITARY CONFINEMENT OF THE PETITIONER VIOLATES THE *UNITED NATIONS CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* WHICH WAS RATIFIED BY THE UNITED STATES

The United States became a party on November 20, 1994 to the *United Nations Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, Treaty Document 100-20. The Convention's definition of "torture" was enacted into law by 1994 P.L. 103-236, 18 U.S.C. § 2340. The definition of "torture" in §2340 provides:

> (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
>
> (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from... (C) the threat of imminent death; or (D)... other procedures calculated to disrupt profoundly the senses or personality;

It is submitted that the keeping the Petitioner at the Georgia State Prison where known members of the Nuestra Familia would subject the Petitioner to "threat of imminent death" which de facto required his indefinite incarceration in solitary confinement for seventeen years was sadistically calculated to "disrupt profoundly the senses or the personality." This United Nations Treaty is now the law of the United States and conduct of the Respondents fits the definition of torture which was inflicted upon the Petitioner by virtue that they knew that he would have been subjected to "threat of imminent death" at the Georgia State Prison

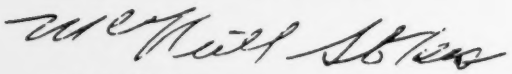
disclosing his real name among inmates of the Nuesta Familia or being subjected to perpetual solitary confinement which will "disrupt profoundly [his] senses or [his] personality."

Mr. Justice Beyer in his dissenting opinion from the denial of certiorari in *Knight v. Florida*, 528 U. S. 990 (1999) pointed to the United States ratification of the *Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment* and commented that other foreign county standards as useful in deciding the case under Constitution of the United States. However, in Doe's case the enabling definition of torture is now an important part of our law. The keeping of the Petitoner in perpetual solitary confinement under threat of imminent death in the general prison population fits the language and spirit of the *Convention Against Torture* against mind altering conditions likely to be disrupting of senses and personality.

CONCLUSION

Petitioner has endured an unprecedented seventeen years long period of solitary confinement which is reminiscent of the endurance of Alexander Dumas' depiction of the isolation of *The Man in the Iron Mask*. It is also as barbaric as Alabama's hitching prisoners to a post all day in the hot sun without food, water or bathroom breaks that shocked the consciences of the United States Supreme Court in *Hope v. Pelzer*, supra. But by comparison The Alabama prison authorities only hitched prisoners to a post for a day, John Doe had been hitched to his solitary confinement cell for seventeen years. Surely our civilized society cannot tolerate this clear injustice as this Court has previously defined to give Doe judicial relief under the Eighth and Fourteenth Amendments.

Respectfully Submitted,



McNeill Stokes
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No. _____

In The Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DAVID THOMPSON, ALLEN AULT, A.G. THOMAS, MICHAEL GROVES, and HUGH LONG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

APPENDIX

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
March 9, 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-11576

D.C. Docket No. 95-00147-CV-6

REY DAVID VARGAS,

Plaintiff-Appellant,

versus

DAVID THOMPSON,
ALLEN AULT,
A.G. THOMAS,
MICHAEL GROVES,
HUGH LONG,

Defendants-Appellees,

JOHNNY SIKES,
Southeastern Regional Director of the
Georgia Department of Corrections,
KATHLEEN HAWK SAWYER, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Georgia

(March 9, 2004)

Before ANDERSON, BARKETT and RONEY, Circuit Judges.
PER CURIAM:

Based upon the representations of counsel at oral argument on November 4, 2003, the Court, by interim Order dated November 12, 2003, referred this appeal to the Kinnard Mediation Center for settlement discussions under Federal Rule of Appellate Procedure 33 and Eleventh Circuit Rule 33-1. As a result of these efforts at mediation, the parties have resolved the issue of the transfer of the Appellant. However, despite extensive efforts, the parties were unable to settle their differences on the two remaining issues, namely, (1) whether the district court should have allowed the Appellant to pursue an action under the Eighth and Fourteenth Amendments because of his seventeen years in administrative solitary confinement, and (2) whether the court erred in granting a judgment as a matter of law in favor of the Appellees.

After careful review of the parties' briefs and the record, we agree that the Appellant has been in protective custody at his own request and has suffered no legally cognizable injury as a result. We thus find no reversible error and affirm the judgment of the district court with respect to both issues.

AFFIRMED.

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

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CLERK /s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

JOHN DOE,

Plaintiff

vs.) Case No.: CV695-147

DAVID THOMPSON;
ALLEN AULT;
A.G. THOMAS;
MICHAEL GROVES;
and HUGH LONG,

Defendants.

ORDER

Before the Court is Plaintiff's Motion to Modify Court's Order of March 4, 2003. (Doc. 281). Plaintiff asks the Court to modify its Order to allow Plaintiff to raise at trial the issue of unconstitutional conditions of confinement in administrative segregation. This claim was dismissed at the summary judgment stage in an order dated March 28, 2000. Summary judgment was granted on the ground that there existed no genuine issues of material fact as to whether Defendants Thompson and Thomas exhibited

deliberate indifference to a risk to Plaintiff's health or safety from his conditions of confinement. Accordingly, Plaintiff's motion is **DENIED.**

SO ORDERED this 14th day of March, 20, 2003.

s/William T. Moore, Jr.
WILLIAM T. MOORE, JR
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

THOMAS K. KAHN
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9235

D.C. Docket No. 98-00049-CV-6

JOHN DOE,

Plaintiff-Appellant,

versus

JOHNNY SIKES, Warden,
THURBERT BAKER,

Defendants-Appellees,

Appeal from the United States District Court for the
Southern District of Georgia

(June 7, 2000)

Before BIRCH and BARKETT, Circuit Judges
and ALARCON*, Senior Circuit Judge.

---

*Honorable Arthur L. Alarcon, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

PER CURIAM:

Appellant appeals the district court's denial of his motion for a preliminary injunction. Upon review of the record, we find that the district court abused its discretion in denying Appellant's motion for preliminary injunction at that early stage of the proceedings.

I. BACKGROUND

John Doe[1] a Georgia prisoner, filed a petition for writ of habeas corpus which the district court construed as an action under 42 U.S.C. § 1983. In the petition, he alleged, inter alia, that the defendants, Georgia State Prison ("GSP") Warden Johnny Sikes, Commissioner J. Wayne Garner, Valdosta Correctional Institute ("VCI") Warden LeLand Linaham and Deputy Warden Mike Keown, and Attorney General Thurbert Baker had violated his constitutional rights by transferring him between VCI, GSP, and Autry State Prison ("ASP"). Doe also filed a motion for preliminary injunction, and included an affidavit in which he attested that, upon entering VCI, he had requested protective custody from Linaham because the Nuestra Familia, Mexican Mafia, and Aryan Brotherhood had placed "contracts on [his] life." R1-6, Affidavit at 1-2. He stated that, although he advised Linaham that he was participating in the Federal Witness Protection Program because he had testified against the named groups in eight murder trials, Linaham placed him in the general population and refused to listen to him. He also claimed that he spoke about the matter to Keown, but he also refused to grant him protective custody. After he was threatened by two inmates for being a "snitch," he wrote a letter to the F.B.I. and filed a civil complaint. Id.

[1] We have used a fictitious name in order to protect the identity of this inmate, given the allegations of his pleadings as described below. We also direct the Clerk of this Court to place under seal the entire record and pleadings in this case.

at 3. He said that, three days after filing the complaint, he asked Keown for a grievance form in order to complain about the lack of treatment for an abscessed tooth and Keown ordered him out of his office. See id. at 3-4. Doe claimed that Keown then placed him in administrative segregation and filed a fabricated disciplinary report. See id. Doe subsequently filed several grievances against Linaham and Keown, complaining that they had denied him protective custody and necessary dental work and were disciplining him in retaliation for the filed grievances. See id. at 4. An F.B.I. agent contacted Linaham and was advised by him that Doe would be transferred because his life was in danger. Within one week, Doe was transferred to GSP. See id. at 6.

Doe filed a supplemental motion for preliminary injunction and attached another affidavit in which he stated that, in 1998, he was transferred to ASP two days after Sikes informed him that he was to be transferred because he had brought too many lawsuits against Georgia prison officials. See R1-9, Affidavit at 1. Doe claimed that, once he was at ASP, an ASP guard also told him that he had been transferred because he filed too many lawsuits. See id. at 3. Doe says that he has been housed in solitary confinement continuously since 1996, at both GSP and ASP. See R1-9, Brief at 5. Doe claimed that, during the trial leading to his incarceration, the Gwinnett County District Attorney revealed confidential information to the media about his participation in the Federal Witness Protection Program which put him at substantial risk of attack in prison as a "snitch." Id. at 4-5. He sought an injunction directing state prison officials to release him from solitary confinement, to transfer him into federal custody or to an out-of-state prison where he would not be known, and to enjoin any future retaliatory transfers.

The magistrate judge recommended that Doe's Eighth Amendment claim for deliberate indifference to his safety be dismissed and that the motion be denied. See R1-13

at 6. He found that Doe had failed to establish a substantial risk of irreparable injury or likelihood of success on the merits of this claim. The magistrate judge noted that Doe had not alleged that the state officials had been unable to protect him, and had not alleged facts that "definitively show" that his transfers were in retaliation for exercising his First Amendment right to petition the government. Id. at 5-6. However, two days later, the magistrate judge found that Doe's complaint stated a viable First Amendment claim and ordered service of process on Linaham and Keown. See R1-15 at 3.

Doe filed objections to the magistrate judge's recommendation that his motion for preliminary injunction be denied. He maintained that he had written letters to Sikes, Garner, and Bowers which were either ignored or unanswered, showing a deliberate indifference to his health and safety, and that his being in administrative confinement for more than 12 years was cruel and unusual punishment because it was essentially punitive. See R1-17 at 8, 10. He explained that he had alleged facts showing that his transfers were retaliatory, and contended that his transfer to a federal prison would allow him to enter a facility especially for government informants or that his transfer to a prison in a different jurisdiction would protect him from inmates since the media would not have to broadcast his identity. See id. at 23-24. In support of his objections, he attached affidavits from two prisoners who stated that they had each heard several inmates yell death threats to Doe. See id., Exhs. B and D. One of the prisoners also said that he had overheard Keown saying that he wanted Doe and other "writ writers" transferred to GSP shortly before Doe was transferred. Id., Exh. D.

The district court overruled Doe's objections and adopted the magistrate judge's recommendation, denying Doe's motion for preliminary injunction and dismissing his Eighth Amendment claim of deliberate indifference. Doe

appealed. This court found it had jurisdiction to review the denial of the motion for preliminary injunction, but lacked jurisdiction to review the dismissal of his Eighth Amendment claim because the order did not dispose of all of the issues in the case.

II. DISCUSSION

Doe argues that the district court abused its discretion by denying him a preliminary injunction on the grounds that he failed to show a substantial threat of irreparable injury or a likelihood of success on the merits of his Eighth and First Amendment claims. He maintains that, as long as he is housed at GSP, he will continue to suffer severe psychological stress because he lives in close proximity to prisoners who know that he is a government informant and who threaten to kill him.

A. The Eighth Amendment Claim

We review the district court's denial of a preliminary injunction under an abuse of discretion standard. See Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc., 14 F.3d 1507, 1517 (11th Cir. 1994), cert. denied, 513 U.S. 1146, 115 S.Ct. 1092 (1995). Although review is limited, a court "'may look to otherwise nonappealable aspects of the order,'" Speer v. Miller, 15 F.3d 1007, 1009-10 (11th Cir. 1994) (quoting Callaway v. Block, 763 F.2d 1283, 1287-88 n. 6 (11th Cir. 1985)), where the issue is "so 'closely related to the interlocutory order being appealed,'" id. (quoting Cable Holdings of Battlefield, Inc. v. Cooke, 764 F.2d 1466, 1472 (11th Cir. 1985).

To obtain a preliminary injunction, a plaintiff must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the plaintiff's threatened harm outweighs the threatened harm to the defendant; and (4) an injunction would not disserve the

public interest. See Speer, 15 F.3d at 1010 n. 4, (citing Haitian Refugee Center, Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991), cert. denied, 502 U.S. 1122, 112 S.Ct. 1245 (1992)). A preliminary injunction transferring an inmate to a different institution may be properly granted upon a finding that the inmate's life and safety are in danger in the institution where he is incarcerated and that, because of the particular and unusual facts of his situation, the safety of the prisoner cannot be adequately guaranteed at the institution. See Streeter v. Hopper, 618 F.2d 1178, 1182 (5th Cir. 1980).

A prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment if the official knows that the inmate faces a substantial risk of harm and disregards that risk by failing to take reasonable efforts to abate it. See Farmer v. Brennan, 511 U.S. 825, 828, 114 S.Ct. 1970, 1974 (1994). A claim alleging "that prison officials have labeled (a prisoner) a snitch and are exposing him to inmate retaliation, perhaps because of his conduct in bringing prior lawsuits . . . is sufficient to carry a cause of action through the service of process stage." Harmon v. Berry, 728 F.2d 1407, 1409 (11th Cir. 1984). "[A] prison inmate has a constitutional right to be protected from the constant threat of violence and from physical assault by other inmates. " Zatler v. Wainwright, 802 F.2d 397, 400 (11th Cir. 1986). In reviewing the dismissal of claims, this court accepts as true all well-pleaded facts in the complaint and all reasonable inferences drawn from those facts. See Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485 (11th Cir. 1992), cert. denied sub nom. Deutcsh v. Oladeinde, 507 U.S. 987, 113 S.Ct. 1586 (1993).

Doe claimed that he was an informant who had testified for the prosecution in eight murder trials, was housed in segregated confinement with violent felons, and had been threatened by at least two prisoners on two separate occasions with death or serious physical injury. He

maintained that he had informed prison officials numerous times of his status as a government informant and of his need for protective custody, but that they ignored his requests and placed him into solitary confinement as punishment. Taking everything he says as true, Doe established an Eighth Amendment violation under Farmer. The magistrate judge, therefore, erred in finding that Doe had failed to allege that the jail officials had deliberately fostered dangerous conditions and refused his safety concerns, and had failed to allege that he had suffered any harm at the hands of the other inmates. Further, the district court could have found that, based on the particular and unusual facts that Doe was a government informant and had received threats to his life, he had satisfied the second prong of the test for a preliminary injunction that there was a substantial risk of irreparable harm.

B. First Amendment Claim

In order "[t]o state a first amendment claim for retaliation, a prisoner need not allege violation of a separate and distinct constitutional right [so long as] the gist of the retaliation claim is that a prisoner is penalized for exercising the right of free speech." Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (quoting Thomas v. Evans, 880 F.2d 1235, 1242 (11th Cir. 1989). In Mitchell, this court reversed the dismissal for failure to state a claim where the prisoner alleged that he had been transferred to another facility after a writing a letter and filing a grievance concerning prison activities. Id. at 1489-90. The "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347 373, 96 S.Ct. 2673, 2690 (1976).

Doe claimed that, in retaliation for his filing grievances and lawsuits against prison officials, he was transferred between VCI, GSP, and ASP. He argues that, in retaliation for writing to the F.B.I. and filing a complaint

regarding his placement in the general prison population, Keown refused him dental treatment for an abscessed tooth, placed him in administrative segregation, and filed a fabricated disciplinary report against him.

In the absence of evidence to the contrary, Doe presented sufficient allegations to show that he has been transferred and placed in administrative segregation for exercising his First Amendment right. Further, the magistrate found that Doe established a likelihood of success on this claim. The threatened harm to Doe outweighs any harm to the defendants if an injunction is granted, and the granting of a preliminary injunction would not disserve the public interest.

III. CONCLUSION

Doe established that he met the four criteria for issuance of a preliminary injunction. The district abused its discretion in denying Doe's motion at this early stage of the proceedings. We vacate and remand for an evidentiary hearing.

VACATED AND REMANDED.

FILED
U.S. DISTRICT COURT
SAVANNAH DIV.

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CLERK /s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

REY DAVID VARGAS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION
	:	NO.: CV695-147
DAVID THOMPSON;	:	
ALLEN AULT;	:	
A.G. THOMAS;	:	
MICHAEL GROVES,	:	
and HUGH LONG,	:	
	:	
Defendants.	:	

ORDER

After a careful review of the file, the Court concurs with the Magistrate Judge's Report and Recommendation, to which objections have been filed. Accordingly, the Report and Recommendation of the Magistrate Judge is adopted as the opinion of the Court.

Plaintiff's Motion for Summary Judgment is **DENIED**. Defendants' Motion for Summary Judgment is

GRANTED in part and **DENIED** in part. Summary judgment is **DENIED** to Defendants on the following claims: (1) Plaintiff's claim that Defendants Ault and Long exhibited deliberate indifference to his health or safety by transferring him to Valdosta Correctional Institution; (2) Plaintiff's claim that Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety through excessive exposure to Environmental Tobacco Smoke; (3) Plaintiff's claim that Defendant Groves exhibited deliberate indifference to his health or safety by ignoring his request for a transfer from Valdosta Correctional Institution; and (4) Defendants' claim of summary judgment on the basis of qualified immunity. Summary judgment is **GRANTED** on Plaintiff's claims of deliberate indifference and deprivation of equal protection regarding the conditions Plaintiff's confinement.

SO ORDERED this 28th day of March, 2000.

s/William T. Moore, Jr.
WILLIAM T. MOORE, JR
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF GEORGIA

FILED
U.S. DIST. COURT
BRUNSWICK DIV.

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CLERK s/
SO. DIST. OF GA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

REY DAVID VARGAS,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION
	:	NO.: CV695-147
DAVID THOMPSON;	:	
ALLEN AULT;	:	
A.G. THOMAS;	:	
MICHAEL GROVES,	:	
and HUGH LONG,	:	
	:	
Defendants.	:	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, an inmate presently confined at Georgia State Prison ("GSP") in Reidsville, Georgia, has been permitted to proceed *in forma pauperis* in an action under 42 U.S.C. § 1983 contesting the conditions of his confinement. Plaintiff has filed a Motion for Summary Judgment. Defendants have filed a response in opposition to Plaintiff's motion and a cross-motion for summary

judgment. Plaintiff has filed a response to Defendants' motion.

STATEMENT OF THE CASE

In his Complaint and numerous amendments, Plaintiff alleges several claims against Defendants Thompson, Thomas, Ault, Long, and Groves. First, Plaintiff alleges that on August 5, 1994, Defendants Ault and Long exhibited deliberate indifference to his safety in violation of the Eighth Amendment by ordering that he be transferred from protective custody ("PC") confinement at GSP to Valdosta Correctional Institute ("VCI"), where he was placed in the general population. Plaintiff asserts that Defendants Ault and Long knew that his life was in danger of attacks from other inmates because he was a key government witness in eight murder trials in California against high-level prison and street gang members of a Mexican mafia family, yet they transferred him to VCI despite knowledge of the danger to Plaintiff. Plaintiff contends that his life was threatened by two inmates housed in the general population at VCI because he was an informant for the federal government. Defendants Ault and Long assert that they had no personal knowledge of Plaintiff's need for protective custody and were not deliberately indifferent to his safety.

Second, Plaintiff alleges that Defendants Thompson and Thomas exhibited deliberate indifference to his health and safety by exposing him to excessive levels of environmental tobacco smoke ("ETS") while he was confined in protective custody at GSP from 1988-1995.[2] According to Plaintiff, he complained of the unbearable levels of smoke to both Defendants and they did nothing. Plaintiff contends that he has suffered eye irritation,

[2] Although Plaintiff was transferred to VCI on August 9, 1994, he was transferred back to protective custody at GSP on April 5, 1995.

headaches, nausea, dizziness, and hacking coughs as a result of the alleged exposure to ETS. Defendants deny that they were deliberately indifferent in exposing Plaintiff to ETS. They assert that there is a good ventilation system for airflow exhaust, which was checked regularly by an environmental specialist. Defendants also contend that Plaintiff's medical records do not indicate that he suffered or complained about any physical symptoms related to ETS.

Finally, Plaintiff asserts that the conditions of his confinement in the Special Management Unit under protective custody violated the Eight Amendment's prohibition of cruel and unusual punishment and the Fourteenth Amendment's guarantee of equal protection of the laws.[3] In support of his claim of Defendants Thompson and Thomas's deliberate indifference to the conditions of his confinement, Plaintiff alleges that he has been confined to protective custody for approximately thirteen years, under which he remains locked-down in his cell twenty-four hours a day, with the exception of one hour per day for outside recreation and fifteen minutes a day for a shower. Additionally, Plaintiff contends that the restrictions placed on inmates housed under protective custody are excessive because they allegedly are denied access to vocational and educational programs, the gym, counseling, and meaningful library access. Plaintiff also alleges that these restrictions on the privileges that general population inmates enjoy violates his equal protection rights. Defendants deny that have exhibited deliberate indifference to Plaintiff's conditions of confinement. They also contend that such restrictions are necessary to ensure the safety of inmates that are

[3] Plaintiff alleges additional causes of action for the first time in his Motion for Summary Judgment, including denial of his substantive due process rights, fabrication of a disciplinary report, denial of procedural due process, and a retaliation claim. However, as Plaintiff has been given many opportunities to amend his Complaint and failed to add these claims at the appropriate time, the Court will not address these improperly joined claims.

housed under protective custody, and that protective custody inmates still enjoy many of the same privileges as general population inmates.

STANDARD OF DETERMINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the burden of showing that there is no genuine dispute as to any material fact in the case, and that the party is entitled to judgment as a matter of law. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970); Clemons v. Dougherty County, 684 F.2d 1365, 1368 (11th Cir. 1982). The party moving for summary judgment may meet this burden by showing that the nonmovant has failed to make a showing sufficient to establish the existence of an element essential to the nonmovant's case and on which the nonmovant will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If there is any factual issue in the record that is unresolved by the motion for summary judgment, the court may not decide that matter. See Environmental Defense Fund v. Marsh, 651 F.2d 983, 991 (5th Cir. 1981).[4] All reasonable doubts must be resolved in favor of the party opposing summary judgment. Rooney v. Watson, 101 F.3d 1378, 1380 (11th Cir. 1996); Casey Enters. v. American Hardware Mut. Ins. Co., 655 F.2d 598, 602 (5th Cir. 1981).

However, when the moving party's motion for summary judgment has pierced the pleadings of the opposing party, the burden shifts to the opposing party to show that a genuine issue of material fact exists. Anderson v.

[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1985); Real Estate Fin. v. Resolution Trust Corp., 950 F.2d 1540 1543 (11th Cir 1992). An issue of material fact is "genuine" if the nonmoving party responds with evidence "such that a reasonable jury could return a verdict" in its favor. Liberty Lobby, 477 U.S. at 248, 106 S. Ct. at 2510. However, a court must first determine if the movant satisfied his initial responsibility of demonstrating the absence of a genuine issue of material fact and, further, whether he is entitled to summary judgment as a matter of law before the burden shifts to the nonmoving party. Livernois v. Medical Disposables, Inc., 837 F.2d 1018, 1022 (11th Cir. 1988).

DISCUSSION AND CITATION OF AUTHOIRTY

I. Summary Judgment Should be Denied to Plaintiff and Defendants on the Claim That Defendants Ault and Long Were Deliberately Indifferent to Plaintiff's Safety by Transferring Him to VCI.

Plaintiff alleges that Defendants Ault and Long exhibited deliberate indifference to his safety when they transferred him from protective custody at GSP to VCI on August 5, 1994, where he was placed in the general population. (Pl. Aff. Supp. Summ. J. ¶ 5.) Plaintiff asserts that Defendants transferred him despite their knowledge that his life was in danger in general population, due to the prosecutors in Plaintiff's criminal case revealing to the media his participation as a key witness for the government in several murder trials and in the Witness Protection Program. In support of his claim, Plaintiff offers several items of evidence. First, Plaintiff provides a November 21, 1986 letter by a F.B.I. agent to the Georgia Department of Corrections ("GDC"), in which the F.B.I. agent set forth Plaintiff's extensive assistance to the federal government and his placement in the Witness Protection Program. (Letter Attached Compl.) The letter also informed GDC that Plaintiff would "not be taken into Federal custody

as long as the State of Georgia can keep him safe either in its own system or through transfer to another state." (Id.) Defendants admit that this letter was in Plaintiff's prison file. (Def. Ault Admis. No. 8; Def. Long Admis. No. 11.) Plaintiff also provides an admission from Defendant Long that he and Defendant Ault participated in the decision to transfer Plaintiff to VCI, (Def. Long Admis. No. 5, No. 8.), as well as the transfer order that Defendant Long signed. Defendant Long also admits that some of the inmates housed in the general population at VCI may have committed violent crimes. (Def. Long Admis. No. 15.) Plaintiff asserts that his life was threatened by two inmates, armed with knives, who were housed in the general population at VCI because he was an informant for the federal government. (Pl. Aff. Supp. Summ. J. ¶ 7.)

Defendants Ault and Long deny that they exhibited deliberate indifference to Plaintiff's safety. Defendant Long asserts that Plaintiff was transferred because of inmate population redistribution. (Def. Long Answers Pl. Interrogs. No. 6.) Defendant Ault denies that Plaintiff's life was in danger prior to his transfer from GSP to VCI or that his life was in danger because of his participation in the Witness Protection Program. (Def. Ault Admis. No. 3, No. 9.) Defendant Ault and Defendant Long deny that they had knowledge of Plaintiff's need for protective custody and contend that they did not make any decisions regarding his housing status. (Def. Ault Aff. ¶ 5; Def. Long Aff. ¶ 5.)

It is well established that the Eight Amendment imposes a duty upon prison officials to provide for the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994) (citation omitted). Specifically, "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Id. at 833, 114 S. Ct. at 1976 (quotation marks and citation omitted). However, an Eighth Amendment violation occurs only if two elements are

shown: (1) "the deprivation alleged must be, objectively, sufficiently serious," such that the conditions the inmate is confined under pose "a substantial risk of harm," and (2) the prison official must have exhibited "deliberate indifference to inmate health or safety." Id. at 834, 114 S. Ct. at 1977.

As the Eleventh Circuit noted, "deliberate indifference has three components: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." McElligott v. Foley, 182 F.3d 1248, 1255 (11th Cir. 1999). On a motion for summary judgment, a genuine issue of material fact exists if the record contains evidence of a prison official's subjective awareness of the risk of harm to the plaintiff. Id. Therefore, a plaintiff must demonstrate that a defendant knew of the immediate safety risks and failed to take appropriate measures to prevent the harm.

Plaintiff and Defendants offer conflicting evidence of Defendants' subjective knowledge of harm to Plaintiff. As such, genuine issues of material fact exist as to whether Defendants Ault and Long were deliberately indifferent to Plaintiff's safety by transferring him to VCI on August 5, 1994.

II. Summary Judgment Should Be Denied to Plaintiff and Defendants on the Claim That Defendants Thompson and Thomas Exhibited Deliberate Indifference to Plaintiff's Health or Safety By Exposing Him to Excessive Levels of ETS.

Plaintiff alleges that Defendants Thompson and Thomas exhibited deliberate indifferent to his health or safety from October 1988-September 1995 when they exposed him to excessive levels of ETS from inmates and guards smoking in the dormitories at GSP. (Pl Aff. Supp. Summ. J. ¶ 12.) Plaintiff contends that as a result of this exposure, he suffers from eye irritation, headaches, nausea,

dizziness, and hacking coughs. (Id.) Plaintiff asserts that he notified Defendants Thompson and Thomas and medical personnel of the unbearable levels of ETS. (Id.; Pl Aff. Supp. Opp'n Def. Mot. Summ. J. ¶ 13.) Plaintiff alleges that Defendants had sufficient knowledge of the harm posed to him by this exposure and did not take any corrective measures. (Pl. Aff. Supp. Summ. J. ¶ 12.) In support of his claim, Plaintiff offers admissions from Defendants Thompson and Thomas that studies have indicated that ETS exposure can pose health risks. (Def. Thompson Admis. No. 7; Def. Thomas Admis. No 5.) Defendants also admit that the GDC implemented a no-smoking policy in the dormitories in 1996. (Def. Thompson Admis. No 8; Def. Thomas Admis. No. 6.) Plaintiff also offers the affidavit of Inmate John Scieszka, which states that Inmate Scieszka has personally observed Plaintiff hacking and coughing ever since he has known Plaintiff. (Scieszka Aff. ¶ 6.)

Defendants Thompson and Thomas deny exposing Plaintiff to excessive risks of ETS. They allege that GSP has an excellent ventilation system that adequately deals with airflow ventilation. (Def. Thompson Aff. ¶ 3; Def. Thomas Aff. ¶ 3.) Defendants assert that an environmental specialist regularly monitored the ventilation system. (Id.) Additionally, Defendants contend that Plaintiff's medical records indicate that he never suffered or complained about any symptoms related to ETS. (Scott Aff. ¶ ¶ 2-3; Def. Thomas Aff. ¶ 3.) Finally, Defendants Thomas asserts that Plaintiff's claims regarding ETS exposure should be barred because they were not filed within the two-year statute of limitations period.

As a threshold matter, the Court determines that plaintiff's claims against Defendant Thomas regarding ETS exposure are not barred by the statute of limitations. The statute of limitations in a 42 U.S.C. § 1983 action is determined by state law. Harding v. Staub, 490 U.S. 536, 538, 109 S. Ct. 1998, 2000, 104 L. Ed. 2d 582 (1989). In

Giles v. Garwood, 853 F.2d 876, 877 (11th Cir. 1988), the Eleventh Circuit held that the appropriate statute of limitations is that which provides a limitations period for personal injuries. The statute of limitations in Georgia for this action is two years. O.C.G.A. § 9-3-33. As Plaintiff alleged in his Complaint, filed on May 18, 1995, that the exposure to ETS was continuous from 1988 to 1995, his claims were filed within the two-year statute of limitations period.

The Supreme Court has held that a "cause of action exists under the Eighth Amendment when a prisoner alleges that officials have, with deliberate indifference, exposed him to levels of environmental tobacco smoke (ETS) that pose an unreasonable risk of serious damage to his future health." Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22 (1993). In order to establish an Eighth Amendment violation for exposure to ETS, a prisoner must establish both an objective and subjective component. Id. With respect to the objective factor, a scientific and statistical inquiry must be made with regard to "the seriousness of the potential harm and the likelihood that such injury to health will actually be caused by exposure to ETS." Id; see also Farmer v. Brennan, 511 U.S. 825, 843, 114 S. Ct. 1970, 1982, 128 L. Ed. 2d 811 (1994) (defining deliberate indifference). Therefore, a plaintiff must demonstrate that the defendant knew of the immediate safety risks and failed to take appropriate measures to prevent the harm.

Plaintiff offers evidence that he suffers ailments related to his alleged exposure to excessive levels of ETS. Defendants offer conflicting evidence regarding Plaintiff's alleged exposure and resulting ailments. As such, genuine issues of material fact exist as to whether Defendants Thompson and Thomas were deliberately indifferent in exposing Plaintiff to excessive level of ETS.

III. **Summary Judgment Should be Granted to Defendants Thompson and Thomas on Plaintiff's Claims Alleging That the Conditions of His Confinement Constituted Cruel and Unusual Punishment and Denied Him Equal Protection of the Laws.**

In his Complaint, Plaintiff asserts that Defendants Thompson and Thomas were responsible for confining him under unconstitutional conditions. Specifically, Plaintiff alleges that the conditions of the Special Management Unit, where he was housed under protective custody status, constituted a risk to his health and safety and that Defendants Thompson and Thomas were deliberately indifferent to that risk. Plaintiff also contends that he as confined under conditions different than inmates in general population who are similarly situated to Plaintiff. In support of these claims, Plaintiff offers evidence that inmates under protective custody status are locked-down in their cells twenty-four hours a day, with only one hour outside of the cell for outdoor recreation and a fifteen minute shower daily. (Pl. Aff. Supp. Summ. J. ¶ 1; Carroll Aff. ¶ 1(a).) Plaintiff also complains that inmates under protective custody are denied many privileges that are afforded to inmates in general population, including vocational and educational classes, gym access, and unlimited access to legal materials and the law library. (Pl. Aff. Supp. Summ. J. ¶ 1; see also Carroll Aff. ¶ 1(b)-(i).) Plaintiff also alleges that the differences in the conditions of confinement between protective custody status inmates and general population inmates violates his equal protection rights.

Defendants Thompson and Thomas deny being deliberately indifferent to Plaintiff's health or safety or depriving him of equal protection of the laws. Defendants allege that the restrictions placed on protective custody inmates are necessary to protect the inmates' safety. (Def. Thomas Aff. ¶ 4; Defs.' Brief Supp. Summ. J. ¶ 2.) In their

Response to Plaintiff's Request for Admissions, Defendants Thompson and Thomas refute Plaintiff's allegations about the denial of privileges provided to general population inmates and show that protective custody inmates were given similar privileges, which were restricted, as those provided to general population inmates. (Def. Thompson Admis. No. 17-21; Def. Thomas Admis. No. 14.)

A. Deliberate Indifference to a Risk to Plaintiff's Health or Safety from the Conditions of His Confinement.

It is well established that the Eight Amendment imposes a duty upon prison officials to provide for the safety of inmates. Farmer v. Brennan, 511 U.S. 825, 832, 114 S. Ct. 1970, 1976, 128 L. Ed. 2d 811 (1994) (citation omitted). Specifically, prison officials are vested with the duty to safeguard inmates against unsafe conditions of confinement. This duty to safeguard requires prison officials to provide inmates with adequate food, shelter, clothing, and medical care. Id. at 832, 114 S. Ct. at 1976. In order to establish deliberate indifference to conditions of confinement, a plaintiff must show two elements. Id. at 834, 114 S. Ct. at 1977; Cottrell v. Caldwell, 85 F.3d 1480, 1490-91 (1996). The first element is objective, where a plaintiff must establish that the deprivation alleged was "objectively, sufficiently serious." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977; Cottrell, 85 F.3d at 1491. The second element is subjective, where a plaintiff must establish that a prison official exhibited "'deliberate indifference' to inmate health or safety." Farmer, 511 U.S at 834, 114 S. Ct. at 1977; Cottrell, 85 F.3d at 1491. "Deliberate indifference" requires a "sufficiently culpable state of mind." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977.

In the case *sub judice*, Plaintiff has failed to produce evidence to support his claim that his conditions of confinement constituted cruel and unusual punishment.

Assuming, without deciding, that the conditions of Plaintiff's confinement were objectively, sufficiently serious, Plaintiff has failed to offer any evidence that Defendants Thompson and Thomas were deliberately indifferent to a risk t his health or safety from the conditions of his confinement. Defendants assert that the restrictions placed on protective custody inmates are required for the protection of the inmates' under such status. The record is devoid of any evidence showing that Defendants had the sufficiently culpable state of mind required for a deliberate indifference claim. There is no genuine issue of material fact as to whether Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety from his conditions of confinement. Therefore, summary judgment should be **GRANTED** to Defendants Thompson and Thomas on this claim.

B. Denial of Equal Protection Relating to the Differences in Conditions of Confinement Between Protective Custody Inmates and General Population Inmates.

The Supreme Court has long established that the Equal Protection Clause requires that "all persons similarly situated should be treated alike." Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985). In order to prevail on an equal protection claim not based upon membership in a protected class, a plaintiff must meet two requirements: (1) "that he was treated differently than other prisoners in his circumstances," and (2) that such unequal treatment was due to intentional or purposeful discrimination. Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644, 650-51 (D.C. Cir. 1987).

In the case *sub judice*, Plaintiff has failed to produce evidence sufficient to support a claim for deprivation of his equal protection rights. Plaintiff has failed to demonstrate

that he was treated differently than other prisoners under protective custody status, those inmates similarly situated to Plaintiff and in his circumstances. Plaintiff has only alleged that his conditions of confinement are different than those of general population inmates, who are not subjected to the same restrictions as protective custody inmates, and thus are not similarly situated. There is no genuine issue of material fact as to whether Defendants Thompson and Thomas deprived Plaintiff of his rights to equal protections of the laws in relation to the conditions of his confinement. Therefore, summary judgment should be **GRANTED** to Defendants Thompson and Thomas on this claim.

IV. Summary Judgment Should Be Denied on Plaintiff's Claim Alleging That Defendant Groves Exhibited Deliberate Indifference to Plaintiff by Failing to Protect Him from a Risk of Harm to His Safety.

Plaintiff alleges that Michael Groves, an Assistant Attorney General for the State of Georgia, exhibited deliberate indifference to his safety. (Pl. Am. Compl., Docket Doc. No. 5.) According to Plaintiff, Defendant Groves ignored his request to be transferred from VCI because his life was in danger, which Plaintiff allegedly made to Defendant Groves at a January 11, 1995 habeas corpus hearing. (Id.) On December 21, 1999, Defendants filed a Suggestion of Death as to Defendant Groves, (Docket Doc. 179,) but failed to respond in their Motion for Summary Judgment to the claim asserted against Defendant Groves by Plaintiff. As no substituted party has been named for Defendant Groves, he has not had an opportunity to respond. A genuine issue of material fact exists as to whether Defendant Groves was deliberately indifferent to Plaintiff's safety. Therefore, summary judgment should be **DENIED** to Plaintiff on this claim.

V. Defendants Are Not Entitled to Summary Judgment On the Basis of Qualified Immunity.

Defendants contend that they are entitled to summary judgment on the basis of qualified immunity. State employees retain qualified immunity when performing discretionary functions. This immunity shields those employees so long as their conduct does not violate clearly established rights. Harlow v. Fitzgerald, 457 U.S. 800, 818. 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). However, it is clearly established that prison officials have a duty to protect inmates when they know of a substantial risk of harm to their health or safety. Farmer, 511 U.S. at 834, 114 S. Ct. at 1977, 128 L. Ed. 2d 811; see also McElligott, 182 F.3d at 1255. Genuine issues of material fact remain as to whether Defendants Ault, Long, Thompson, and Thomas were deliberately indifferent to a risk to Plaintiff's health or safety. Defendants cannot claim qualified immunity in this suit because there was a clearly established duty to protect Plaintiff from a known risk of substantial harm to his health or safety. Therefore, summary judgment should be **DENIED** to Defendants on the basis of qualified immunity.

CONCLUSION

For the above and foregoing reasons, it is my **RECOMMENDATION** that Plaintiff's Motion for Summary Judgment be **DENIED** and that Defendants' Motion for Summary Judgment be **GRANTED** in part and **DENIED** in part. Summary judgment should be **DENIED** to Defendants on the following claims: (1) Plaintiff's claim that Defendants Ault and Long exhibited deliberate indifference to his health or safety by transferring him to VCI; (2) Plaintiff's claim that Defendants Thompson and Thomas exhibited deliberate indifference to a risk to Plaintiff's health or safety through excessive exposure to ETS; (3) Plaintiff's claim that Defendant Groves exhibited deliberate indifference to his

health or safety by ignoring his request for a transfer from VCI; and (4) Defendants' claim of summary judgment on the basis of qualified immunity. Summary judgment should be **GRANTED** on Plaintiff's claims of deliberate indifference and deprivation of equal protection regarding the conditions Plaintiff's confinement.

SO REPORTED and **RECOMMENDED**, this 6th day of March, 2000.

s/James E. Graham
UNITED STATES MAGISTRATE JUDGE

No. 03-1617

Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHN DOE,

Petitioner,

v.

DAVID THOMPSON, ALLEN AULT, A.G. THOMAS, MICHAEL GROVES, and HUGH LONG,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTIONS TO PETITION

1. Petitioner's "questions presented for review" do not properly reflect the facts in evidence in this action.
2. Petitioner's "reasons for granting the petition" do not properly reflect the facts in evidence in this action.

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Jurisdiction Statement

The underlying District Court jurisdiction arising under 28 U.S.C. Section 1331 is based on Federal Law, 42 U.S.C. §1983. There was an appeal from the final order of the District Court to the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. §§1291 and 1294. The judgment of the United States Court of Appeals for the Eleventh Circuit Court of Appeals was rendered on May 20, 2004. The statutory provision conferring jurisdiction on the Supreme Court of the United States to review on a Writ of Certiorari is 28 U.S.C. §1254.

Statement of the Case

John Doe, Petitioner, came from the Federal Witness protection program to Georgia during the early 80's. While in Gwinett County and in the witness protection program he was convicted of child molestation and sentenced to prison. After his conviction he escaped. When captured he was sentenced to the maximum on both charges, to run consecutively. His incarceration in the Georgia prison system began October 17, 1986.

Since his conviction Petitioner has maintained the position that he was a very important witness for the Federal Government. He says he turned on several members of the Nuestro Familia, Mexican Mafia and the Aryan Brotherhood gangs, of which he was a member during the 70's. He further says his testimony resulted in solving at least 15 murders, he testified in eight murder trials with one resulting in the death penalty. Petitioner takes the position that a contract for his life has been put out by these gangs and he cannot live in general population for fear of being attacked, assaulted or killed because of him being labeled a "snitch" or "rat". Petitioner further maintains that the inmates within the Georgia prison system know who he is because the DA who prosecuted him for child molestation told the public who he was when he escaped.

Petitioner alleges he has been in "solitary Confinement" for seventeen years. He has not been in solitary confinement he has been in protective custody at his own request. Petitioner was in what is called "PCPC" at Georgia State Prison. This is the highest level of protective custody the Georgia Department of Corrections offers. In PCPC status Petitioner was in a single man cell, he exercised alone, showered alone and was escorted anywhere he went alone with one correctional officer for security. The difference in PCPC and other segregation, which is referred to as administrative segregation, is that administrative segregation is punitive in nature. Anything other than general population is considered special management but protective custody is different than administrative segregation.

Inmates in protective custody are housed in a different building than other inmates. In protective custody the inmate retains the same privileges as other inmates in general population, other than the freedom of movement within the dorm. Protective custody inmates retain the right to store, telephone, visitation etc. Petitioner is also allowed to continue any religious or educational opportunities through in cell one on one teaching by prison staff. Georgia has protected Petitioner from harm by keeping Petitioner in protective custody, as Petitioner requested, and Petitioner has never been harmed.

Georgia has communicated with other governments regarding a placement for Petitioner. However the problem is that if Petitioner is transferred The State of Georgia will have to continue to pay the costs and remain responsible for Petitioner. It is unreasonable to expect the State of Georgia to transfer this inmate to another state, and yet still maintain responsibility and liability for the inmate's safety. It is more reasonable to keep the inmate in Georgia custody where Georgia can insure his safety. According to an excerpt from a letter from the FBI admitted into evidence at trial, because of his crime after relocation, Petitioner will not be taken into federal custody as long as the State of Georgia can keep him safe, either in its own system or through transfer to another state.

Petitioner has never produced one iota of facts that any Defendant has told other inmates who Petitioner is. Petitioner has never produced any set of facts to suggest the Defendants have been deliberately indifferent to his safety. In fact, the truth is, the Defendants have never revealed to other inmates who Petitioner is and have kept him in protective custody because that is the best place for his own safety. It is in the record that Petitioner admits the person who revealed his identity is the prosecutor in Gwinett county. Petitioner even states he found out it was the DA who prosecuted him that put the information out as to who he was. Petitioner stated in his testimony on May 16, 2001 at the Waycross hearing before Judge Graham that "all of this situation has been created by going back to

district attorney and people as word spreads in the prison system. And no matter where you go, it will be the same way." Petitioner blames the DA for the troubles he has as a result of people knowing who he is. At trial he stated "I'm saying that because the prosecutor and the situation...." basically blaming the prosecutor for the situation he has had to deal with while incarcerated.

Petitioner argues his duration of solitary confinement has caused him "extreme psychological" harm. However, Petitioner has continuously prosecuted this case, and effectively presented this case to a jury. He appears to be in very good physical health and there are no notes of any type of mental or physical injures in his medical file. If there were, Petitioner would have pointed those out to the trial court as well as this court. Petitioner simply has been in protective custody at his own request and has suffered no harm as a result thereof.

In Petitioner's statement of the case he relates, at the oral argument the panel of the United States Court of Appeals for the Eleventh Circuit ordered mediation which after seventeen years finally resulted in the Georgia Department of Corrections agreeing to Petitioner's transfer from solitary confinement at the Georgia State Prison to another prison where he could be safe in the general population. However, Petitioner did not bother to inform this Court the reason the Georgia Department of Corrections agreed to transfer Petitioner was because he finally agreed to sign a release and waiver verifying that his life would not be in danger at the new prospective prison and that he (Doe) accepted responsibility for his safety. Said release and waiver is all that had been standing in Petitioner's way of a transfer for several years (in light of the fact on two previous transfers Petitioner had complained about the transfer and sued Department of Corrections personnel for ignoring what he said was a danger to him).

Argument and Citation of Authority

A. Petitioner's "questions presented for review" do not properly reflect the facts in evidence in this action.

1.

Does incarcerating Petitioner in solitary confinement for seventeen years for his protection against imminent death from other inmates in the general prison population constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments when he could have been transferred to another prison where he would have been safe in the general prison population?

There are several ways in which this question presented for review does not properly reflect the facts in evidence in this action. The first of which is the characterization of "solitary confinement." Petitioner was in Protective Custody, not any type of punitive confinement. The conditions of confinement were evaluated in earlier proceedings and found not to be in violation of the Eighth Amendment in and of themselves. The second improper characterization is the statement "imminent death from other inmates." The record reflects the alleged threat is one "reported" by the petitioner himself. There is absolutely no evidence of actual danger other than the claims of petitioner that there is a contract on his life. The steps taken by Defendants to protect Petitioner have been in cooperation with Petitioner's requests. Another improper characterization is the statement "when he could have been transferred to another prison where he would have been safe in the general prison population." One thing Petitioner does not want to mention at this phase of the action is the fact that on two previous occasions (during the alleged 17 years of solitary confinement), Petitioner was transferred to other prisons within the Georgia Prison system, Valdosta State Prison and Autry State Prison. These were routine population redistribution transfers. On both occasions, immediately upon arriving at these prisons the Petitioner requested to be locked down in protective custody

claiming his life would be in danger in general population at these prisons. And related to both transfers, Petitioner claimed Defendants retaliated against him by transferring him, and were deliberately indifferent to his safety by transferring him to these prisons. In earlier legal proceedings Petitioner has claimed that all Georgia prisons would be a danger to him in general population, stating "no matter where you go, it will be the same way." Yet now, several years later in this litigation, Petitioner wants to claim Defendants would not transfer him to another prison where he would be safe in the general prison population. Petitioner is clearly misrepresenting the facts as they have evolved in this case.

A more properly framed question for review might be, "Does incarcerating Petitioner in protective custody at his own request for seventeen years for his protection against imminent death from other inmates in the general prison population constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

2.

Does qualified immunity protect prison officials against liability for continuing the incarceration of Petitioner in solitary confinement for seventeen years to protect him against death from other inmates in the general prison population when they have been deliberately indifferent to transferring him to another prison where he would have been safe in the general prison population?

This question presents a lot of the same issues discussed in section 1. However, one of the largest misrepresentations is the statement "when they have been deliberately indifferent to transferring him to another prison where he would have been safe in the general prison population." Exactly what does Petitioner mean by being deliberately indifferent to transferring him? Does Petitioner here imply he has some constitutional right to a transfer at his desire? There is absolutely no evidence in the record that would reflect the Defendants were ever deliberately indifferent to Petitioner's safety. As a matter of

fact, they have successfully protected petitioner for seventeen years, even in the face of the threat of "imminent death from other inmates" as Petitioner claims.

A more properly framed question might be, Does qualified immunity protect prison officials against liability for continuing the incarceration of Petitioner in protective custody at his own request for seventeen years to protect him against death from other inmates in the general prison population, or does the constitution create a responsibility for prison officials to seek the solution most desirable to the inmate regardless of the fact his safety is secured in protective custody?

3.

Does incarcerating the Petitioner where he is subject to imminent threat death in the general population or perpetual solitary confinement which after long periods are calculated to disrupt profoundly his senses and personality violate the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment?

This question for review is totally improper. Petitioner was not incarcerated where he was in danger. Petitioner was incarcerated in Protective Custody which has successfully protected him for seventeen years. Petitioner himself has previously proclaimed the threat was in general population throughout the Georgia Prison system. Therefore, the more proper question might be does Georgia have the authority to enforce the legal sentence of a criminal court within this state? For that is exactly what Petitioner has been trying to set up by this whole process; Georgia's inability to enforce a proper sentence from a criminal Court. The next point of error in this question for review is the statement "which after long periods are calculated to disrupt profoundly his senses and personality." There is no evidence in the record to reflect the incarceration is calculated to disrupt profoundly petitioner's senses and personality. And the final point of fatal error in this question for review is the statement "violate the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or

Punishment." This claim was not asserted in the original complaint and therefore should not be an issue of consideration on Writ for Certiorari.

B. Petitioner's "reasons for granting the petition" do not properly reflect the facts in evidence in this action.

1.

Petitioner has claimed there is a conflict in the circuits as to whether extended administrative solitary confinement violates the Eighth Amendment and the Fourteenth Amendment. In pursuing said line of argument, Petitioner has quoted Colon v Howard 215F.2nd 227 as a conflicting circuit ruling. However Colon v Howard 215F.2nd 227 must be an improper citation. That citation refers to Louisville & N. R. Co. v. Tucker 215 F.2d 227 (C.A.6 1954) which is totally unrelated to this case. Petitioner also quotes Tellier v. Fields, 280 F.3d 69 (C.A.2 (N.Y.),2000). However, Tellier deals with an involuntary segregation. "It is undisputed that upon Tellier's arrival at MCC, he was placed in a Special Housing Unit ("SHU") because he was considered an escape risk. The exact amount of time Tellier spent in SHU is a matter of minor dispute. Both parties below, as well as the district court, calculated the time at 522 days, but on appeal the time period cited by both parties indicates a confinement of 514 days. Tellier alleges that he was neither initially informed of the reason for his placement in SHU, nor was he subsequently permitted to be heard regarding his continued confinement there." Therefore the issue dealt with in Tellier was the examination of whether 504 days in (punitive) solitary confinement was past the limit of extra confinement which would invoke the protections of due process? It did not find, as Petitioner would attempt to imply, that de facto incarceration in solitary confinement past 504 days, in and of itself regardless of the reason, is a violation of Eighth Amendment. Petitioner also quotes Sheley v. Dugger, 833 F.2d 1420 (C.A.11 (Fla.),1987). However, Sheley also deals with a punitive

segregation. Petitioner quotes from the ruling "Sheley's twelve year confinement in CM raises serious constitutional questions." However, the very next sentence that Petitioner ignores is "In addition to the mental and physical deterioration he alleges, Sheley's Eighth Amendment claim is supported, at this stage of the litigation, by his contention that his confinement in CM is punitive in nature. If the segregation is punitive, it should be determined whether it shocks the conscience, is grossly disproportionate to the offense, or is totally without penological justification." It should be noticed the ruling states "if the segregation is punitive," and then goes on to list other factors that must be considered before the confinement begins to rise to the level of a constitutional deprivation. As also in the citation of Williams v. Fountain, 77 F.3d 372 (C.A.11 (Ga.),1996); the case cited does not appear to state what Petitioner claims it states. Williams deals with a disciplinary confinement for a period of one year, where the Plaintiff had challenged due process. Unless Counsel for Defendant is grossly misreading the decision, nowhere in the body of the case does it appear to set a "high water mark" limiting solitary confinement to twelve months. The Court affirmed the lower court decision to grant summary judgment for the government. Petitioner begins discussion in section I by making the statement, "this case presents the fundamental issue as to whether de facto keeping an inmate incarcerated in solitary confinement for an extended indefinite period of time is cruel and unusual punishment and therefore violative of the Eighth Amendment as well as the Fourteenth Amendment." Yet, the cases Petitioner has cited do not address that position, nor do they show a conflict between circuits.

Quite opposite to what Petitioner attempts to argue, many circuits have addressed the issue of whether segregation, in and of itself, is a violation of the Eighth Amendment. In Jackson v. Meachum, et. al., 699 F.2d 578 (1983) the plaintiff was assaulted by many inmates, removed from the facility and then attempted to be returned to the same facility. This plaintiff refused to return for fear of more assaults. This plaintiff was

placed in a special housing unit which contained 2 kinds of patients, 1)the new arrivals who stay a few days for evaluation and 2) the remaining inhabitants who are suicidal, disruptive or violent, escape risks, or in protective custody. This plaintiff was placed here because he was determined to be suicidal but also for his own protection. The court ended up defining the issue as whether extended, indefinite segregated confinement in a facility that provides satisfactory shelter, clothing, food, exercise, sanitation, lighting, heat, bedding, medical attention, personal safety, but virtually no communication or interaction with fellow inmates, which confinement results in some degree of depression, constitutes cruel and unusual treatment violative of the Eighth and Fourteenth amendment, to the extent that prison authorities can be required to provide several hours daily interaction with other inmates. This court relied on Rhodes v. Chapman which makes clear that discomfort compelled by conditions of confinement, without more, does not violate the Eighth Amendment.

In Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4th Cir. 1975) the court stated, "isolation from companionship, restriction on intellectual stimulation and prolonged inactivity are inescapable accompaniments of segregated confinement, will not render segregated confinement unconstitutional absent other illegitimate deprivations. Nor will the fact that the segregated confinement is prolonged and indefinite be sufficient in itself to command constitutional protection, though it is a factor to be considered, especially if the confinement is punitive rather than administrative or protective." In Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977) the court stated "The mental, physical, and emotional status of individuals, whether in or out of custody, do deteriorate and there is no power on earth to prevent it..... If the State furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight. The Constitution does not require that prisoners, as individuals or as

a group, be provided with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration."

Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980) stated "inactivity, lack of companionship and a low level of stimulation do not constitute cruel and unusual punishment even if they continue for an indefinite period of time, although the duration is a factor to be considered, especially if the confinement is punitive."

Clearly the many circuits have reached the conclusion that the extended stay in solitary confinement without other intrusions into basic human needs is not in and of itself a violation of any inmates Eighth Amendment right. It should also be noted that these courts were addressing these issues from the perspective of these inmates being in punitive segregation. Doe was not and has not ever been in punitive segregation, he has been in protective custody at his own request.

Therefore, Petitioner has not demonstrated a sufficient conflict between the rulings of the circuits to invoke Supreme Court scrutiny.

2.

Petitioner claims the decision of the Court of Appeals in sanctioning the Petitioner's indefinite solitary confinement for seventeen years as protection from imminent threat of death from other inmates conflicts with relevant decisions of this Court defining cruel and unusual punishment and due process. In his argument Petitioner states "the Court of Appeals in the June 7, 2000 opinion found on the unusual facts in the instant case that Farmer v Brennan, 511 U.S. 825 825 (1994) was controlling precedence that 'a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment if the official knows that the inmate faces a substantial risk of harm and disregards that risk by failing to take reasonable measures to abate it.'" In his original complaint, Petitioner claimed Defendants ignored the threats

against him and exposed him to danger. However, there was no evidence to establish any defendant as acting with deliberate indifference to the risk of harm by the threats Plaintiff reported. Quite to the contrary, Defendants did such a good job of protecting Petitioner, he now complains of the protection afforded. Each and every time Petitioner was placed in protective custody it was at his request. It seems somewhat ironic for someone to ask for protection and then complain about the method of protection. Petitioner goes on to state "And the Courts decision held that under the facts of Doe's pleadings and affidavits that 'Doe established an Eighth Amendment violation under Farmer.'" (Counsel quotes it as A-10, when it is actually on page A-11 of Counsel's attachment.) And what Counsel fails to quote is the beginning of that sentence which says, "Taking everything he says as true, Doe established an Eighth Amendment violation under Farmer." This statement of the Court was not a finding on the merits, but a failure to state a claim review. Since Petitioner first claimed the Defendants refused to protect him from the threat of other inmates, the court evaluated the claim as if that statement were true. However, at trial the court found there was absolutely no credible evidence to support that claim. Throughout those pages in Petitioners brief he makes reference to numerous quotes from that Eleventh Circuit ruling. However, the quotes he cites were not a finding on the merits, but a failure to state a claim review. Therefore, they have no bearing after a case has been adjudicated on the merits as this case was. In the second paragraph of page 9 Petitioner appears to be quoting Sheley v. Dugger, 833 F.2d 1420 (C.A.11 (Fla.),1987) in his statement, "In *Sheley v Dugger*, supra, the Eleventh Circuit reaffirmed that twelve years of administrative solitary confinement would violate the Eighth Amendment recognizing the physical and mental deterioration of inmates facing prolonged confinement in maximum security and that the existence of feasible alternatives should have been implemented including transferring the inmate to a less dangerous prison where his identity could have been kept secret or releasing him on

parole." Counsel writes this as one sentence implying it was the finding of the Court in Sheley. However, this is a misrepresentation of the law. The Sheley ruling had nothing to do with "the existence of feasible alternatives should have been implemented including transferring the inmate to a less dangerous prison where his identity could have been kept secret or releasing him on parole." Sheley dealt with an inmate with an extensive history of escape risk being held in punitive segregation for twelve years and the question was whether the prison did not adequately satisfy due process in evaluating whether the inmate should stay in segregation, and the length of confinement. The closest Sheley comes to stating the points to which Counsel refers is the statement, "As with Sheley's other claims, however, we cannot decide the Eighth Amendment issue at this time. Because no evidence on the Eighth Amendment claim has been presented, we remand to the district court for an evidentiary hearing at which both sides may present evidence on the reasons for Sheley's segregation, the conditions in CM, the effects of long-term confinement in CM, the psychological evaluations (if any) that Sheley has received, and the possibility of feasible alternatives. *See Demps,* 805 F.2d at 1433; *see also Meriwether,* 821 F.2d at 417 (it was premature for the district court to dismiss the Eighth Amendment claims of an inmate facing prolonged confinement in segregation "without ascertaining the actual conditions of [the inmate's] confinement and the existence of any feasible alternatives"); *cf. Sweet,* 529 F.2d at 866 ("We accordingly feel constrained because of the extended period of time of plaintiff's confinement in maximum security to remand the case to the district court in order that it may take additional testimony and consider in greater detail whether the health of the plaintiff may be adversely affected by the restricted exercise rights accorded him.")." However, the Court followed that with the bold statement, "We express no views on the merits of any of Sheley's claims. We simply find that we cannot adequately address the claims without the benefit of more facts. The decision of the district court denying Sheley's petition for a writ

of habeas corpus is reversed and the case is remanded with instructions to hold an evidentiary hearing for the purpose of addressing Sheley's claims." Petitioner tends to suggest the ruling sets a precedence wherein it can be concluded that twelve years in administrative solitary confinement would violate the Eighth Amendment regardless of the reason for confinement or any other considerations. Respondents disagree with Petitioner's interpretation of this ruling.

3.

Petitioner claims qualified immunity does not protect prison officials from the obvious constitutional violations who under color of law have de facto kept the petitioner incarcerated in solitary confinement for seventeen years without transferring him to a prison where his life would not have been in imminent danger. However, Petitioner's claim quickly unravels when examined in the light of the true facts of this case (as argued in earlier sections). As Petitioner quotes from Hope v Pelzer, 536 U.S. 730, for a constitutional right to be clearly established for purposes of qualified immunity, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right; this is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent. The right which this Petitioner claims, the right to be free from extended incarceration in protective custody (even when at the inmate's own request), is not a clearly established constitutional right. The argument is somewhat ridiculous in and of itself. To even begin this thought process the question must be asked, Is Doe in protective custody as a result of punishment or is he is there for protection? Doe has not been in protective custody for this length of time for punishment. He has been there for his own protection as well as the protection of any other inmate who may want to pick a fight with him.

In a hearing held May 16, 2001 Doe admits being in

PCPC voluntarily. He agreed he was in protective custody because he believed he needed it and thus requested it. When Doe was transferred back from VSP to GSP he again requested to be in protective custody.

At trial the judge said "As I understand the testimony before the Court today, you do not have to remain in protective custody if you wish to sign the necessary forms with the State of Georgia asking that you be removed from protective custody. Now, you say that you don't want to be in protective custody, but you're fearful of your life if you're removed from protective custody. That's a policy matter between you and the Federal Bureau of Prisons and the state prison system, not to be determined by this Court."

Before this argument is ensued it must be remembered an inmate has no inherent constitutional right to be housed in a particular institution. Meachum v. Fano, 427 U.S. 215, 226, 96 S. Ct. 2532, 49 L.Ed.2d 451 (1976) or to enjoy a particular security classification Beard v. Livesay 798 F.2d 874, 876 (6th Cir. 1986) Moody v. Daggett 429 U.S. 78, 97 S. Ct. 274, 50 L.Ed.2d 236 (1976) Olim v. Wakinekona, 461 U.S. 238, (1983). Thus the issue is not decided from the perspective of Petitioner having a right or choice in the matter of where he will be housed. It is a discussion from the perspective of whether he is being deprived of basic human needs by a defendant who is being deliberately indifferent towards Petitioner.

The Eighth Amendment prescribes punishment that shocks the conscience, offends society's evolving notions of decency or is grossly disproportionate to the offense. Hutto v. Finney, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed. 2d 522 (1978) Conditions of confinement constitute cruel and unusual punishment in violation of the Eighth Amendment when they involve the "serious deprivation of basic human needs" and are "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 346-47, 101 S. Ct. 2392 (1981). An inmate must show the conditions of confinement resulted in the deprivation of a basic human need or inflicted unnecessary pain and suffering, and that the defendants were deliberately

indifferent to that condition. Lamarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993). Prisoners challenging the conditions of their confinement under the eighth must show deliberate indifference by the responsible officials. Wilson v. Seiter, 111 S. Ct. 2321, (1991) After incarceration, only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoners interest or safety. Whitely v. Albers, 475 U.S. 312 (1986) Administrative segregation and Solitary confinement do not, in and of themselves, constitute cruel and unusual punishment. Hutto Id.. Because Petitioner has adequate food, clothing, sanitation and privileges the conditions of confinement do not on their face violate the Eighth Amendment.

A court must consider whether the conditions involve unnecessary and wanton infliction of pain when determining whether conditions of confinement amount to cruel and unusual punishment. Estelle v. Gamble, 429 U.S. 97, 104 (1976) Unnecessary and wanton inflictions of pain are those that are "totally without penological justification." Rhodes v. Chapman, 452 U.S. 337, 349 (1981) To determine whether a condition of confinement results in unnecessary and wanton infliction of pain two requirements must be satisfied: first, the deprivation must be sufficiently serious such that it results in the denial of "the minimal civilized measure of life's necessities," and second, the prison official's state of mind must be one of "deliberate indifference" to the inmate's health or safety. Farmer v. Brennan, 511 U.S. 825 (1994).

With respect to the deliberate indifference portion of cruel and unusual punishment analysis Petitioner argues there are alternatives to his confinement and thus his rights are being violated because he could be some where else that is more palatable to him. He has failed to demonstrate how his health or safety is at an excessive risk or how anyone has acted with Deliberate Indifference towards him. If anything, the

Respondents have complied with his every wish and kept him in protective custody because he feels his life is in danger. Petitioner has been afforded protective custody at his request, thus demonstrating that in maintaining custody of plaintiff, defendants have acted with due diligence rather than deliberate indifference.

Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists. Wilson v. Seiter, 501 U.S. 294, 305 (1991)

Petitioner does not argue his confinement is cruel and unusual because he is deprived of food, clothing, shelter, medical care or other basic human need. As Petitioner admits in his petition, "the District Court ruled adversely to the Plaintiff that the conditions of confinement (food, sanitary, etc) were adequate." He is totally relying on the fact he has been in protective custody for 17 years as the reason his confinement is cruel and unusual. Thus the real issue here is whether the protective custody is in and of itself a violation of Petitioner's eighth amendment right to be free from cruel and unusual punishment. Pursuant to the current rules as stated in Rhodes, Farmer and Hutto, Petitioner must show a deprivation of a basic human need and that the deprivation is motivated by an officials deliberate intent to harm this Petitioner. Petitioner has produced no facts to even suggest this, or even a set of facts from which it could be circumstantially concluded his right was violated.

For the sake of argument what if this Honorable Court were to hear Petitioners frivolous claims and decide to adopt Petitioner's position that incarceration in a non punitive segregation (such as protective custody) for extended periods of time was in and of itself a constitutional violation?

Reversing the Trial Court in this matter would be contrary to public interest. Granting Plaintiff's request and allowing his arguments to stand would be adverse to the public interests and create a windstorm of inmate requests for PCPC. If this is allowed, inmates will get to GSP (or any other prison

for that matter), request PCPC, get it, stay a while, then request a transfer to another state or into the federal system claiming PCPC is cruel and unusual punishment. If the inmate were transferred he would then get himself to PCPC status at the new prison, claim cruel and unusual punishment and again want to be transferred to a place more palatable to him. If this Plaintiff is allowed to pick and choose his place of confinement the entire prison system in this nation will have to be revamped, that is a monetary and ethical cost that no state can afford at this time. Not to mention the undermining of the security and control the public expects prison administrations to maintain.

What about the prisoner on death row, who through repeated appeals stretches out the length of time he is incarcerated in segregation? Does that mean his incarceration is cruel and unusual punishment? What about the large number of inmates, who through escapes and violent behavior within prison find themselves on extended segregation for many years? Does that make his incarceration, in and of itself, cruel and unusual punishment even after the prison has satisfied all concerns of due process and conditions of confinement? What about the law enforcement officer who is convicted of a crime and because of his past employment cannot be placed in general population? Do we declare his sentence void just because he may be subjected to extended periods of protective custody? What about the multitude of other inmates who for whatever reason choose to request protective custody status and stay there for extended periods of time? Do we open the door for them to file lawsuits for cruel and unusual punishment due to a condition they themselves chose? The answer to all of these questions is, Of Course Not. Likewise, John Doe does not have the clearly established constitutional right he petitions this Court to protect.

4.

Petitioner claims the indefinite long term solitary confinement of the petitioner violates the *United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* which was Ratified by the United States. However, for reasons already discussed in this brief, and due to the fact the claim was not raised in the Petitioner's original complaint, the claim is totally without merit and should not be considered by Petition for Writ of Certiorari.

Conclusion

Petitioner wants to make himself out to be some type of martyr because he has spent 17 years in protective custody. This criminal's interests balanced against the interest of the State, society and other inmates, especially taking into consideration he has never been harmed, is in good health, has no mental health history within the system, has food, shelter, medical care, law library, and recreation, is such that there has been no violation of any constitutional right what so ever. For these reasons Doe's Petition for Writ of Certiorari should be denied and the Appeals Courts ruling upheld.

Respectfully Submitted,

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